United States Court of Appeals

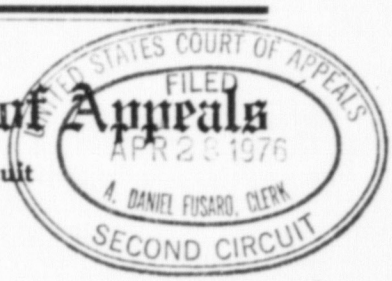
for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

75-7664

To be argued by
JACK HART



United States Court of Appeals

For the Second Circuit

CHAMPION INTERNATIONAL CORPORATION,

Plaintiff-Appellee,

against

CONTINENTAL CASUALTY COMPANY,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

APPELLANT'S REPLY BRIEF

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The Untenability of Champion's Position

Champion's contention on the appeal, repeatedly stated in its brief, is the same contention it urged in the District Court, namely, that the Liberty Mutual policy had a clause in its "Limits of Liability" section which compels or permits the conclusion that "all property damage from the delamination of vinyl-covered panels is to be considered as arising from one occurrence, since that damage arose out of continuous or repeated exposure to substantially the

same general conditions * * *'' (See Appellee's Brief, pp. 15-16, 28, 36-37). Apparently, Champion is urging that this clause contains the ''contested language'' referred to in Judge Solomon's opinion.

The clause on which Champion relies, which appears in all standard comprehensive general liability policies, and to which Champion refers in several places as ''the unifying definitional directive,'' is as follows:

> ''Coverage A and B—For the purpose of determining the limit of the company's liability (1) all personal injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions and (2) all personal injury arising out of a series of publications or utterances of the same or similar defamatory material shall be considered as arising out of one occurrence'' (JA 498-499, 492).

It is evident that this clause, with reference to the policy's definition of ''occurrence'' (JA 493, 500), merely provides that ''an accident'' resulting in damage to persons or property ''arising out of continuous or repeated exposure to substantially the same conditions'' is treated, for purposes of limits of liability, no differently than ''an accident'' happening suddenly, namely, that the ''one occurrence'' limit of liability is applied regardless of the time element or the number of claimants.

It is submitted that the construction of this provision urged by Champion is not merely unreasonable—it is impossible. And, as we shall show below, Champion's construction is so far-fetched that in a recent case decided by this Court, where the insurance policy contained this provision and where the provision would be controlling if it had

the meaning urged for it by Champion, experienced counsel for the parties never referred to it and the District Court and this Court implicitly but unmistakably rejected it by not even mentioning it.

It is inconceivable that any insured under a comprehensive general liability policy (who was not a primary self-insurer trying to shift the entire loss to an excess policy) would ever believe, let alone contend, that no matter how many accidents were caused by a similar defect in one of its products, or in how many policy periods the accidents took place, its insurance company would be liable only for the same amount as if there had been only one accident. Nor would any insurance company so contend.

As appears from the quoted clause itself, neither the insured nor the insurer had any doubt that there is a distinction between the word "same" and the word "similar". Where, in the case of coverage for defamation, the policy intended to confine to the "one occurrence" limit of liability "publications or utterances of the same or similar defamatory material", the clause simply included both words. There is no basis whatever for the contention that where the word "same" was used in the policy, it could possibly be understood to mean "similar", especially where the same clause used both words.

To sustain its extraordinary contention that its insurance companies must be held to their minimal exposure of "one occurrence", Champion is inevitably driven to irresponsible if not deliberately misleading statements.

Champion's Irresponsible References to the "Batch Clause"

This Court recently considered the so-called "batch clause" in connection with the dispute of the parties as to its applicability to the facts of the particular case in *Home Insurance Company* v. *The Aetna Casualty and Surety Company*, 528 F.2d 1388 (2nd Cir., 1976). Reference to this case is made in Continental's main brief, p. 24.

As quoted in this Court's opinion in *Home*:

> "Endorsement #33 to the policy, known as a 'batch clause', provided in part:
>
> '* * * as respects products liability for * * * property damage coverage
>
> 'All such damage arising out of one lot of goods or products prepared or acquired by the named assured or by another trading under his name shall be considered as arising out of one occurrence" (528 F.2d at 1389).

The question in the case was whether, in applying the "batch clause", there were two or four occurrences. The underlying facts were not in dispute. It was admitted that as a result of production errors at its New Jersey plant, the insured mixed into two lots of its product the *same* harmful ingredient. The two lots were then sent to the insured's Kentucky plant where they were sprayed onto corn cob fractions to make four lots of a product which were sold to a purchaser who used them in making chicken feed. The feed was sold to numerous chicken farmers who

suffered damages "when their poultry's ingestion of the defective feed resulted in various afflictions, some resulting in death" (528 F.2d at 1389).

Both sides in the case sought summary judgment. Judge Carter, finding no ambiguity in the clause, granted summary judgment holding that there were four occurrences. This Court remanded to the District Court to take evidence regarding the disputed contentions of the parties as to the meaning and intent of the "batch clause".

As stated in Continental's main brief (p. 24), this Court left undisturbed Judge Carter's lucid and thorough analysis of the two problems which necessarily preceded a determination of the applicability of the "batch clause", namely (1) what is the meaning of "occurrence", and (2) how is the number of "occurrences" in a given case determined. Obviously, if there was only one "occurrence", the case would be concluded and the "batch clause" would never be reached.

Since, under Champion's contention, the "batch clause", which is clearly intended to limit the insurer's liability, would be wholly unnecessary and could only result in expanding the insurer's liability, Champion is compelled to make statements regarding the "batch clause" which are irresponsible if not deliberately misleading. There are two such statements, both appearing at page 45 of Champion's brief, upon which we will comment seriatim.

(1) The first such statement is:

> "We need hardly stress: in our case the 'lot' or 'batch clause' had been superseded by the unifying defini-

tional directive which mandated that we were dealing with only one occurrence'' (Appellee's Brief, p. 45).

Prior to 1966, the standard comprehensive general liability policy, issued by Liberty Mutual as well as by most other companies, contained the ''batch clause'' which was eliminated in 1966 because it was found unworkable.*

It is, of course, obvious that if the clause relied on by Champion *superseded* the ''batch clause'', then the same policy would not contain both the ''batch clause'' and the clause relied on by Champion. And we are constrained to say that Champion unquestionably knew that *both* clauses

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* The "batch clause" was eliminated from liability policies in the 1966 revision of the standard forms. The reason for its elimination was authoritatively given by Norman Nachman, Manager, Casualty Insurance and Multiple Line Insurance Division of the National Bureau of Casualty Underwriters which developed the revised forms. In his article in the Fall, 1965 issue of *The Annals,* a publication of The Society of Chartered Property and Casualty Underwriters, he said:

> "The problem in many cases in determining what constituted *one lot of goods or products* made retention of this language untenable. Reliance will be placed upon the aggregate limit to establish a cut off of coverage in the kind of catastrophic incidents where the batch clause had been expected to be effective" (emphasis in original). Nachman, "The New Policy Provisions for General Liability Insurance", 18 *The Annals* 197, 204 (Fall, 1965).

See also 3 Long, *The Law of Liability Insurance* App-46 (1975); 2 Hursh and Bailey, *American Law of Products Liability* 2d 562 (note 9) (1974).

It is evident that the elimination of the "batch clause" was intended to and did expand the limits of liability of the standard Comprehensive General Liability Policy, so as to cease to treat a number of accidents as one (for determining limits of liability) where the accidents arose out of one lot of goods or products prepared or acquired by the insured. Champion, however, now is contending that the elimination of the "batch clause" and the retention of the "exposure" clause greatly restricted the limits of liability by treating as "one occurrence" not merely accidents resulting from the same lot or "batch" but all accidents of a similar type.

were contained in its own comprehensive general liability policies prior to 1966 when the "batch clause" was eliminated. In the Joint Appendix on this appeal we have reproduced the comprehensive general liability policy issued by Liberty Mutual to Champion for the period October 31, 1965 to October 31, 1966 (JA 541-582). That policy contains the "batch clause" at JA 544 and the clause relied upon by Champion at JA 553.*

There is no doubt that the clause relied on by Champion did not "supersede" the "batch clause" but was and is included merely to provide that the same limit of liability is to be applied for "an accident" not having an element of suddenness as for a "sudden" accident.

(2) The second of Champion's misleading statements regarding the "batch clause" is made in relation to Judge Carter's analysis in *Home* of what constitutes an "occurrence" and how the number of them is determined. The statement is as follows:

> "Even under Judge Carter's Opinion, the unifying directive would have had a controlling impact" (Appellee's Brief, p. 45).

The unmistakable import of this statement is that the policy before Judge Carter (and this Court on appeal), contained the "batch clause" but not the clause relied on by Champion. Champion's statement is, to say the least, irresponsible because all that was necessary to determine

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* Since the printed portion of that policy still provided for liability coverage for injury or damage caused by "accident", the policy by endorsement provided that the word "occurrence" as defined therein was substituted for the word "accident" wherever the latter appeared in the policy (JA 549, 553).

whether *both* the "batch clause" and the clause relied on by Champion were contained in the policy before Judge Carter, was to look at the Joint Appendix filed by the parties upon that appeal. Of course, that policy contained both clauses: the "batch clause" appears at page 117a and the clause relied on by Champion appears at page 116a of the Joint Appendix in the *Home* case.

Under the construction urged by Champion in this case, it would have to be concluded that the experienced attorneys in *Home,* as well as Judge Carter and this Court, all failed to understand that the question of whether there were two or four occurrences should never have been reached because the "unifying definitional directive" should have had "a controlling impact", and "mandated that [they] were dealing with only one occurrence" (Appellee's Brief, p. 45).

Champion's Misleading Characterization of the Nature of its Business and of its Insurance Coverage

Champion's brief attempts to create the impression that its sole business is selling vinyl laminated panels (Appellee's Brief, pp. 7, 35, 36), that the Liberty Mutual policy and the Umbrella Excess policy are "specialized business policies" (Appellee's Brief, p. 32) solely intended to protect it from liability for delaminations (Appellee's Brief, pp. 36, 37), and that to accept Continental's construction of these policies is to render the coverage of these policies illusory (Appellee's Brief, pp. 16, 17, 31). Any such impression would be totally erroneous.

Champion was and is a worldwide, multi-billion dollar, diversified enterprise whose activities include not only the production and distribution of a wide range of building materials and other wood and paper products but also, to name but a few, production and distribution of furniture, janitorial supplies, food packagings, pharmaceuticals and cosmetics, home building and residential development, and the operation of warehouses, a railroad, and various trucking companies (Exhibit 8, tab 6).

The Liberty Mutual policy provided to this huge enterprise truly comprehensive and general coverage for liability to third parties including not only products liability but also on-premises liability and advertising liability, excluding only such coverages as automobile and aviation liability which are traditionally covered by separate policies (JA 491). The Continental policy provided Umbrella and Excess coverage with respect to not only the Liberty Mutual policy but at least twenty-two other policies including automobile, aviation and employers' liability policies and policies covering various of Champion's joint ventures and subsidiaries (JA 459-467).

All the provisions of the Liberty Mutual policy and Continental Umbrella Excess policy, including the definition of "occurrence", the "limits of liability" for "each occurrence" and for "the aggregate", and the clause concerning "continuous or repeated exposure to substantially the same general conditions", applied to all hazards covered by the policies. The $5,000 deductible applied only to property damage arising out of the products or completed operations hazard and to none other.

As noted in Continental's main brief (pp. 34-35) it simply cannot be believed that Champion, or any insured, would reasonably understand or contend that its coverage for liability to third parties for a series of similar accidents at different times and places involving, for example, serious bodily injuries arising out of the products hazard, or bodily injury or property damage arising out of such "on-premises" incidents as fires, explosions or discharges of polluting effluents, would be restricted to the "one occurrence" limit.

In fact, it is Champion's proposed construction of the policies which would, in large measure, render their coverage illusory since, once the "one occurrence" limit was exhausted, there would be no further coverage for similar accidents.

Liberty Mutual's "Agreement" with Champion's Position

Champion in its brief places some emphasis on the fact that Liberty Mutual "agreed" with its construction of the underlying policies and paid the $100,000 "one occurrence" limit of liability of those policies (Appellee's Brief, pp. 15, 16, 34, 41). The implication is that Champion and Liberty Mutual reached such agreement with each acting in good faith and without ulterior motives. The surrounding facts negate any such implication. It is plain that both Champion and Liberty Mutual stood to profit by their agreement. In the case of Champion, it was a way to shift to Continental a loss for which it was a self-insurer. In the case of Liberty Mutual, there were a number of substantial economic considerations to motivate its agreement, again at the expense of Continental:

(1) Liberty Mutual was Champion's insurer under no fewer than 7 major policies (JA 459-467) of which the instant policy was but one and for which substantial premiums were collected (JA 490a).

(2) Because of the retrospective premium feature of Liberty Mutual's policy (JA 537, 538; Exhibit 8, tab 4), Liberty Mutual's "payment", if any, in connection with the one occurrence limit of $100,000 was undoubtedly in a substantially lesser amount than $100,000.

(3) Pursuant to its insuring agreement in the instant policy, Liberty Mutual, in addition to the duty to pay claims up to the limits of liability, had the obligation to defend suits alleging claims within the coverage and, in discharge of that duty, was permitted to make such investigations and settlements of claims or suits as it deemed expedient (JA 491). Endorsement 8, which provided for the $5,000 deductible per occurrence, also provided that "the terms of the policy, including those with respect to (a) the company's rights and duties with respect to the defense of suits * * * apply irrespective of the application of the deductible amount" (JA 510). The policy provided, however, that upon payment of its applicable limit of liability, Liberty Mutual's duty to defend ceased (JA 491).

Liberty Mutual, therefore, by "agreeing" that all damages caused by the delaminations constituted one occurrence, avoided having to defend or adjust, at its own expense, the great bulk of the approximately 1400 claims throughout the country, a task which, in all likelihood, would have cost much more than the actual limit "pay-

able" by Liberty Mutual for one occurrence under the retrospective feature of its policy.

(4) Upon Liberty Mutual's payment of its "one occurrence" limit, Champion "retained" Liberty Mutual to adjust all remaining claims and, for this service, agreed to pay Liberty Mutual 15 percent of the amounts of the settlements plus expenses for damage surveys and appraisals by independent contractors (JA 24-25, 73). Based on the total claim asserted by Champion (JA 90), Champion apparently has paid Liberty Mutual in excess of $200,000 under this agreement which has been added to the recovery against Continental.

It is evident that the "agreement" between Champion and Liberty Mutual that the damages to some 1400 vehicles in different places, at different times, constituted one occurrence, thereby eliminating the deductible provision from the policy and shifting the losses and expenses to Continental, was based on self-serving economic considerations only, and had nothing to do with the reasonable construction of the policy.

The "Loss Sustained" by Champion

Champion's repeated assertions that it "sustained a loss of more than $1,600,000" (Appellee's Brief, pp. 2, 11, 13-14, 37) are simply not true. Champion has recovered over $1 million from Continental Vinyl's insurer and the manufacturers of the vinyl film and of the adhesive used in the panels in an action in California based on exactly the same facts as form the basis for the instant action.

This Court can easily confirm this fact by putting the question to Champion's counsel. The California action, founded on tort and breach of warranty rather than on an insurance policy, may well have included claims for alleged loss of profits or alleged damage to reputation, but the "hard" damages sought to be recovered were precisely the same as in this action, namely, the payments to third parties for the property damage to vehicles caused by the delaminations.

At the hearing on "damages", Judge Solomon stated that "obviously" Continental "would be subrogated" to Champion's rights of recovery (no doubt, meaning to the extent permissible by law) (JA 205); and Judge Solomon stated he would include in his findings a reference to Continental's right of subrogation (JA 276-277, 296-297). However, the findings made no reference to subrogation (JA 303-304).

The "Burdens" of Proof Imposed by Continental

It is utterly unwarranted—because it is completely untrue—for Champion in its brief in an explosion of unrestrained language to charge Continental with seeking to put a heavy burden upon Champion in submission of its proof (Appellee's Brief, pp. 4-5). The very opposite is true, and was from the beginning, to the unquestionable knowledge of Champion's counsel.

The record in this case leaves absolutely no doubt that from the beginning, Continental's counsel stated that when Champion's records had been collected there would almost surely be no claims that they were not reliable and admis-

sible. At the hearing on "damages", Continental's counsel went so far as to offer to accept an affidavit and not require live witnesses, provided only that the affiant was somebody who could say that the presentation was taken from Champion's records (JA 203, 206-207, 226-227, 230-231, 237, 249, 255, 257).

Continental, in its first brief submitted in this case—its brief to Judge Solomon on the "liability" issue—stated:

> "*Continental's Position*
>
> (a) *Regarding the Facts*
>
> Continental's position from the beginning has been that when Champion has completed collecting and organizing the controlling facts, there will most likely be little, if any, dispute of fact to submit to the Court for adjudication. When Champion instituted this action in November, 1970, it was still engaged in investigating and adjusting claims arising from the alleged delaminations. Accordingly, the complaint demands recovery of $384,304.95 plus additional sums which Champion might become obligated to pay. There will, of course, be no objection on the part of Continental to Champion's amending the amount of its claim at the trial" (JA 182-183).

As appears from Champion's letter of September 9, 1974, to Judge Pollack requesting additional time to collect and review the facts "in order to provide a basis for agreed and disputed findings of fact" (JA 181-182), and from the statement above quoted from Continental's first brief in this action submitted on October 3, 1974, and from the references to the Joint Appendix above noted, there can be no doubt that Continental at all times sought to facilitate the presentation by Champion of the facts on which it relied.

The Extent of Champion's Proof of Damages

Continental, in Point III of its main brief (pp. 35-38), argued that "there was a failure to show that the property damage for which recovery is sought occurred during the policy period". We did not mean by that statement to contend that there was no evidence in the record which might sustain a finding that *some* of the damages to vehicles occurred during the three year Continental period. If such a finding had been made, support might have been found in the transcripts of depositions of five manufacturers of vehicles and in Exhibit 2 which, as noted in Continental's main brief (pp. 13, 36), was admitted (erroneously, we submit) *sua sponte* by the District Judge after its offer had been withdrawn by Champion's counsel. However, reliance on those sources would, at most, have supported a finding of damages during the policy period of very considerably less than $1,105,000.

The District Judge, of course, made no finding of damages sustained during the policy period since, having held that "there was one occurrence which proximately resulted in damage to many vehicles" (JA 164-165), he regarded as immaterial the times when the damages to the various vehicles took place, whether within or without the policy period, and merely found that "As of September 13, 1974 [more than three and a half years after the end of Continental's policy period], plaintiff paid Liberty Mutual a total of $1,513,116.82 for the settlement of the claims for property damage in connection with the delamination of the defective vinyl-covered panels * * *" (JA 303).

Incidentally, a brief reference may be permissible to Champion's assertion in its brief (Appellee's Brief, pp. 9-10) that there is a "misstatement" in Continental's main brief (p. 3) in the statement that the three year Continental policy period was from November 30, 1967 to November 30, 1970. Champion's brief points out that the policy was extended for an additional two months to February 1, 1971. It is a fact that the policy was extended first to December 31, 1970 and then to February 1, 1971 (JA 488-489). However, we do not believe that Champion is contending that those two monthly extensions would include extended coverage for the vinyl-panel delaminations which were then known to be taking place.

Cases Cited by Champion

With respect to its substantive position, Champion cites four cases (Appellee's Brief, pp. 40-42): *Aetna Casualty & Surety Company* v. *Martin Bros. Container and Timber Products Corp.*, 256 F.Supp. 145 (D. Ore., 1966); *Stauffer Chemical Company* v. *Insurance Company of North America*, 372 F.Supp. 1303 and 1308 (S.D.N.Y. 1973); *Grand River Lime Company* v. *Ohio Casualty Insurance Company*, 32 Ohio App.2d 178, 289 N.E.2d 360 (Ct. of App., Franklin Co., 1972); and *Union Carbide Corporation* v. *Travelers Indemnity Company*, 399 F.Supp. 12 (W.D. Pa., 1975). The first three cited cases do not support Champion's position in any respect; the *Union Carbide* case is briefly discussed below.

Aetna was a declaratory judgment action in which the Court held that the insured's liability for personal injury

and property damage resulting from the periodic emission of "flyash" from the insured's mill, while the mill's boilers were being materially modified, was unexpected and therefore within the coverage provided by Aetna's policy for liability for personal injury or property damage caused by an occurrence. The Court did not consider whether the personal injuries and property damage constituted one occurrence or numerous occurrences, perhaps because the claims were quite small (seventeen actions resulted in judgments or settlements totalling $46,354 for property damage and $16,000 for personal injuries) and an issue with respect to limits of liability never arose. Furthermore the situation in *Aetna* is not analogous to the instant case. All of the flyash in *Aetna* was emitted from one mill at one location albeit over a period of time. That might well have been an appropriate occasion for the application of the clause concerning continued and repeated exposure to substantially the same general conditions. Had there been two mills in different states with similarly defective boilers, however, there would be no doubt that there would have been at least two occurrences. And it is this latter situation that is comparable to the instant case.

In the companion *Stauffer* cases, the only issue presented was whether or not there was coverage under the policies at issue, the parties having expressly reserved the issue of the amount of the insurer's liability, if any, for future determination. There is no doubt that the Court did not reach and did not rule on the question of how many occurrences had been involved because that question was not presented for determination.

Grand River was a declaratory judgment action in which the Court held that the insurer was under a duty to defend an action brought against the insured alleging damage-causing emission of industrial wastes into the air in the course of the insured's manufacturing operation. There was no consideration or discussion of how many occurrences might be involved.

Union Carbide, dealing with a 1963 policy, offers no support for Champion's reliance on the clause concerning exposure to the same general conditions but seems to be in accord with Judge Solomon's view that the terms "occurrence" or "accident" refer to the antecedent cause of personal injury or property damage rather than to the unintended and unexpected injury or damage itself. The decision, however, seems to be based on a conceded "ambiguity" in the policy concerning the resolution of which the Court held that it would not be permissible to resort to extrinsic evidence because any testimony in that regard would be only "self serving testimony of the participants" (399 F. Supp. at p. 20). This seems to be in clear conflict with the recent decision of this Court remanding the *Home* case to the District Court (see pp. 4-5 *supra*).

We respectfully submit that the decision in *Union Carbide*, as we understand it, would be erroneous if applied to the instant policy. In *Union Carbide*, the Court (1) held that the insured's production mistake was the accident (399 F.Supp. at 21), apparently ignoring the policy's provision limiting coverage to accidents which occur "after possession of such goods or products has been relinquished to others by the named insured" and "away from the premises owned, rented or controlled by the named in-

sured'' (399 F.Supp. at 14), (2) mentioned none of the more recent precedents cited in Continental's main brief (pp. 22-23), and (3) with the exception of a reference to Judge Solomon's opinion, relied exclusively on an out-of-date annotation (55 ALR 2d 1300 [1957]).

There would appear to be no doubt that the decision in *Union Carbide* is totally at odds with the controlling New York law as expressed in *Arthur A: Johnson Corporation* v. *Indemnity Insurance Company of North America*, 7 N.Y.2d 222, 196 N.Y.S.2d 678, 164 N.E.2d 704 (1959).* The decision also would render meaningless the following clauses of the Liberty Mutual policy which clearly reflect the understanding that the ''occurrence'' is the event for which the insured becomes liable to a third party in damages, namely,

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* In many of the cases in the ALR Annotation relied upon by the Court in *Union Carbide* (*e.g.*, *St. Paul-Mercury Indemnity Company* v. *Rutland*, 225 F.2d 689 [5th Cir., 1955], *Denham* v. *LaSalle-Madison Hotel Company*, 168 F.2d 576 [7th Cir., 1948], *Tri-State Roofing Company* v. *New Amsterdam Casualty Company*, 139 F.Supp. 193 [W.D. Pa., 1955], and *Hyer* v. *Inter-Insurance Exchange*, 77 Cal. App. 343, 246 P. 1055 [1926] involving multiple claims arising from *one* train wreck, *one* fire, or *one* automobile accident), there would have been only one "accident" or "occurrence" under the *Johnson* test, and the Courts were essentially rejecting the argument that each "claim" constituted a separate "accident" or "occurrence".

In the instant case, Continental does not urge that "occurrence" is synonymous with "claim". The delaminations in separate vehicles over an extended period of time in many parts of the country, where the damage to any one vehicle had no effect on any other vehicle, are, under the *Johnson* test, separate events, distinct in space and time, and therefore separate "accidents" or "occurrences". It happens that each such "occurrence" gave rise to a single claim but there is nothing in logic or the policy language to prevent this. Had the panels burst into flames rather than delaminating, each occurrence might have given rise to multiple claims.

Champion's repeated assertions that the deductible was on a "per occurrence" basis rather than a "per claim" basis (Appellee's Brief, pp. 17-18, 19, 38) merely repeat an indisputable fact that the policy was written on a "per occurrence" basis and not on a "per claim" basis.

the unintended infliction of personal injury or property damage:

> "Insured's Duties in the Event of Occurrence, Claim or Suit: (a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time and place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company * * * as soon as practicable. The named insured shall promptly take at his expense all reasonable steps to prevent other bodily injury or property damage from arising out of the same or similar conditions" (JA 494).
>
> * * *
>
> "The insurance afforded by this endorsement [vendors endorsement] does not apply unless the named insured specifically requests the company to extend coverage to such person or organization as an additional insured after an occurrence has taken place, which results or appears likely [to result] in a claim against such person or organization" (JA 512).
>
> * * *
>
> "Insured's Duties in the Event of Occurrence, Claim or Suit [Wisconsin Amendment of Standard Provisions]: (a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given * * * within 20 days following the date of the occurrence; * * *" (JA 514).
>
> * * *
>
> "The insurance afforded by this endorsement [concerning liability for errors, omissions, and defects in

architectural designs, plans and specifications] does not apply to remodeling, demolishing or rebuilding of any structure as a result of error or omission or defect in architectural design which error, omission or defect does not result in an occurrence'' (JA 523).

Conclusion

The judgment below should be reversed and the complaint dismissed.

Respectfully submitted,

HART & HUME
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Of Counsel:
JACK HART
CECIL HOLLAND, JR.

Service of 3 copies of the
within Brief is hereby
admitted this 28th day of
April 1976

Signed _____

Attorney for Plaintiff-Appellee